

Exhibit 19

David Heckert

June 4, 2003

Cincinnati, OH

1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

**CERTIFIED
COPY**

4
5
6 -----
7 THE PROCTER & GAMBLE COMPANY,
8 Plaintiff,
9 vs.
10 THE COCA-COLA COMPANY,
11 Defendant.
12 -----

:
:
:
:
: CASE NO.
: C-1-02-393
:
:
:

13
14
15 Deposition of: DAVID HECKERT
16 Taken: By the Defendant
Pursuant to Subpoena
17 Date: June 4, 2003
Time: Commencing at 9:14 a.m.
18 Place: Dinsmore & Shohl
19 1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
20 Before: S. Diane Farrell, RMR, CRR
21 Notary Public
22 State of Ohio

David Heckert

June 4, 2003

Cincinnati, OH

3

I N D E X

1

2

3

DAVID HECKERT

PAGE

4

5

Cross-Examination by Mr. Ivey

4

6

7

EXHIBITS

MARKED

REFERENCED

8

9

Defendant's Exhibit 1

6

6

10

Defendant's Exhibit 2

13

13

11

Defendant's Exhibit 3

43

43

12

Defendant's Exhibit 4

44

44

13

Defendant's Exhibit 5

84

84

14

Defendant's Exhibit 6

105

105

15

Defendant's Exhibit 7

112

112

16

Defendant's Exhibit 8

134

134

17

Defendant's Exhibit 9

137

137

18

Defendant's Exhibit 10

154

154

19

Defendant's Exhibit 10-a

154

154

20

Defendant's Exhibit 11

166

166

Defendant's Exhibit 11-a

176

176

21

Defendant's Exhibit 12

186

186

Defendant's Exhibit 13

193

193

22

- - -

David Heckert

June 4, 2003

Cincinnati, OH

67

1 Q. I'm sorry.

2 A. Go ahead. Answer -- ask your question.

3 Q. Well, I apologize if I interrupted you.

4 A. Ask your question. Go ahead.

5 Q. Okay. You mentioned that the '847 patent
6 can be made by other methods. Did I understand you
7 correctly?

8 A. That's correct.

9 Q. What other methods would allow someone to
10 make a product under the '847 patent?

11 A. We learned after the fact that you can
12 make this without a premix.

13 Q. Make "this," meaning the '8 --

14 A. Make a product as described without going
15 through a premix step.

16 Q. Okay. And the product as described is in
17 reference to the '847 patent?

18 A. That's correct.

19 Q. Okay. Could you please tell me what you
20 mean by "premix"?

21 A. That's basically -- the method involves
22 taking the acids, making a solution of the acids,

David Heckert

June 4, 2003

Cincinnati, OH

68

1 neutralizing the calcium source in the acids to make
2 a premix, which preferably contains stabilizers.
3 That is then fed into the blend tank where the
4 juice -- concentrated juice comes in.

5 Q. Okay. And for the record, you motioned to
6 a diagram. Was that on the '847 patent that you were
7 referring to?

8 A. I motioned to the diagram, which is on the
9 front of the '963 patent.

10 Q. All right. And that's --

11 A. That's what I -- that is the premix
12 method.

13 Q. All right.

14 A. It describes a premix. There's a box
15 there that says, "Premix Solution."

16 Q. I see that.

17 A. Okay.

18 Q. You say that you learned after the fact
19 that you could make the product in the '847 patent
20 without a premix. Did I understand that correctly?

21 A. That's correct.

22 Q. When after the fact did you learn that?

David Heckert

June 4, 2003

Cincinnati, OH

69

1 A. Let me clarify that.

2 Q. Absolutely.

3 A. It can be used to make a single strength
4 juice. I'm not sure that the method can be used to
5 make the concentrates. I think the concentrates
6 require a premix. I -- I think that's correct.

7 Q. All right. So with regard to the single
8 strength product, was that what you were referring to
9 when you said you learned after the fact that it
10 could be made without a premix?

11 A. Rather than give you a blanket statement
12 that says everything described in the product patent
13 can be made by another method, I'm distinguishing
14 between single strength and concentrates.

15 THE COURT REPORTER: I'm sorry, can you
16 repeat that? Rather than give you a blanket
17 statement that says everything described --

18 A. Your question was, can the product as
19 described in the product patent, which is the '847
20 patent --

21 Q. Yes, sir.

22 A. -- can it be made by a method other than

David Heckert

June 4, 2003

Cincinnati, OH

70

1 the premix, okay? To my knowledge, you're -- the
2 premix method is very important to make the
3 concentrate. The single strength beverage, it's
4 possible to not use the premix method.

5 Q. Okay.

6 A. And that was learned after these patents
7 were filed and issued. That's the best of my
8 knowledge.

9 Q. Yes, sir. All right. And when you say
10 after these patents were issued, did I understand you
11 to say -- to -- to use the plural there?

12 A. I'm not sure of the timing. My role in
13 this was to demonstrate that the product was feasible
14 and the process would work, and at that point it was
15 handed off to somebody else.

16 Q. All right.

17 A. And exactly what inventions, variations
18 were made beyond that was not something that I was
19 following closely. But at this point in time, now, I
20 am aware that there are ways to make the single
21 strength without the premix method.

22 Q. All right. I understand. Let me make

David Heckert

June 4, 2003

Cincinnati, OH

73

1 '847 patent by a method other than the premix for
2 either the single strength or the concentrated juice?

3 MS. FERRERA: Objection.

4 A. Does it describe any other method? Okay.
5 The '847 patent -- your question is relative to the
6 '847 patent?

7 Q. Yes, sir.

8 MS. FERRERA: Do you want -- do you want
9 the question repeated?

10 A. Yes, repeat the question.

11 Q. I'll be happy to. Does the '847 patent
12 describe any method of making the product that's
13 claimed in the '847 patent by a method other than the
14 premix for either the single strength or the
15 concentrated juice?

16 A. It does. And it illustrates other methods
17 which do not work, which we attempted -- I believe we
18 attempted them; that we felt they were significantly
19 inferior to this product, to this process.

20 Q. All right. Let me ask you to take a look
21 at, still with the '847 patent, Exhibit Number 3, at
22 column number 4 and go down to line 57. I'm

David Heckert

June 4, 2003

Cincinnati, OH

76

1 Q. Okay. And the -- if I'm understanding
2 what you were trying to convey here, it was that the
3 premix method solved problems that occurred through
4 the direct addition of calcium?

5 A. That's correct.

6 MS. FERRERA: Objection.

7 Q. Okay. As the inventor of the '847 patent,
8 if I'm understanding correctly, the objective
9 ultimately was a fortified -- a juice fortified with
10 calcium that was a drinkable fruit juice beverage, is
11 that right?

12 A. That's correct.

13 Q. Okay. And would it be fair to say that
14 the experiments that are described in the disclosure
15 of this invention of direct addition of calcium into
16 juice beverages failed to work?

17 A. That's -- yes.

18 Q. Okay.

19 A. In our hands at that time, with our
20 know-how, with the know-how we could get from the
21 prior art, that's correct.

22 Q. All right. What type of calcium was

David Heckert

June 4, 2003

Cincinnati, OH

97

1 office to perform some demonstrations.

2 A. Yes.

3 Q. Who was it who decided specifically what
4 kinds of demonstrations were going to be performed?

5 A. Most likely it would have been Eric and I,
6 Eric Guttag and I.

7 Q. Okay. Why did you select or why were
8 you -- why did you use the demonstrations that are --
9 that are described in Mr. Dake's deposition as
10 opposed to other possible demonstrations you might
11 have made?

12 MS. FERRERA: To the extent that that
13 requires you to discuss communications that you
14 had with Mr. Guttag, I would instruct you not
15 to answer. If you can answer apart from that,
16 you may do so.

17 Q. Right. And, in fact, the only thing I'm
18 interested in is, is what was the scientific
19 objective you were trying to illustrate for the
20 examiner, in your mind, for purposes of this
21 demonstration?

22 A. In my mind, we state in the patent that

David Heckert

June 4, 2003

Cincinnati, OH

98

1 direct addition of some of these materials leads you
2 to problems, so we set a demonstration in front of
3 the examiner and showed that that indeed was the
4 case.

5 Q. Had the examiner expressed some skepticism
6 or disagreement with the point you were just making,
7 that direct addition was -- had problems?

8 A. I don't recall that. I don't remember.

9 Q. Turning to page 3 -- I believe this is
10 paragraph 6. And in the second full paragraph under
11 paragraph 6, it begins with Mr. Dake stating, "I
12 conducted two demonstrations involving direct
13 addition of calcium hydroxide to orange juice." Do
14 you see where I'm reading from?

15 A. Yes.

16 MS. FERRERA: Is that in paragraph 7?

17 MR. IVEY: Is that a 7?

18 MS. FERRERA: Looks like --

19 A. 6 and 7, yeah. It's hard to read the --
20 the copy.

21 Q. I'll take your representation. I'm
22 interested in the -- what it says rather than the

David Heckert

June 4, 2003

Cincinnati, OH

102

1 A. That's correct.

2 Q. Okay. Of the demonstrations that Mr. Dake
3 conducted for the examiner, each of these were direct
4 addition demonstrations, were they not?

5 A. Yes.

6 Q. And did any of the demonstrations yield a
7 successful -- and by the word "successful," I mean as
8 you've defined the word "drinkable," juice product?

9 A. No.

10 MS. FERRERA: Objection.

11 Q. Okay. Was the objective to demonstrate
12 for the examiner that direct addition would, in fact,
13 yield a drinkable juice product?

14 A. The demonstration was to demonstrate that
15 it would not yield a drinkable product.

16 Q. So in -- with regard to the objective of
17 the demonstrations, you would say that each of the
18 demonstrations was successful?

19 A. Yes.

20 MS. FERRERA: Objection.

21 Q. Did the examiner make any comment with
22 regard to the demonstrations that you can recall at

David Heckert

June 4, 2003

Cincinnati, OH

103

1 this point?

2 A. We're talking about 1987 --

3 Q. Yes, sir.

4 A. -- 16 years ago. I -- I -- I can't answer
5 that question sensibly.

6 Q. Now, in paragraph 5 of the -- of the
7 declaration by Mr. Dake, "It states that the orange
8 and grapefruit juice concentrates of paragraph 4 were
9 prepared according to the premix method of the
10 present invention." Did I read that correctly?

11 A. Yes.

12 Q. Is that the same premix method that is
13 described in the '847 patent?

14 MS. FERRERA: Objection.

15 A. Well, it says -- the words say, "according
16 to the premix method of the present invention," so I
17 read the answer as yes.

18 Q. Was the objective of the demonstration,
19 prepared in accordance with the premix method,
20 designed to show that this was a way of solubilizing
21 calcium into juice beverages?

22 A. Yes.

David Heckert

June 4, 2003

Cincinnati, OH

104

1 Q. And also to contrast what would happen if
2 individuals were attempting to solubilize calcium
3 using another method, such as the direct method?

4 MS. FERRERA: Objection.

5 A. To the best of my recollection, that's the
6 point. Again, this was 16 years ago.

7 Q. I understand. What happened to the -- the
8 bottles with the samples in them?

9 A. I suspect we threw them out.

10 Q. There were demonstrations conducted for
11 direct addition using calcium hydroxide and calcium
12 chloride, if I'm not mistaken, is that right?

13 A. Where are you reading?

14 Q. I see in paragraph 6 reference to
15 demonstrations to show the problem caused by direct
16 addition of calcium hydroxide and calcium -- I'm
17 sorry, calcium carbonate to orange juice or to orange
18 juice concentrate. Did I lose you somewhere?

19 A. No, I think I have it.

20 Q. Okay. I'm sorry.

21 A. Starting at March 2nd, 1987?

22 Q. Yes, sir.

David Heckert

June 4, 2003

Cincinnati, OH

108

1 record, that the premix procedure appeared to be
2 preferred or the only workable procedure?

3 MS. FERRERA: Objection.

4 A. Repeat exactly the question, please.

5 Q. Okay. Do you agree with the impression
6 Ms. Paden has put in the examiner interview summary
7 record, that the premix procedure appeared to be
8 preferred or the only workable procedure?

9 MS. FERRERA: Object just to the extent
10 that you're not reading the complete sentence
11 of that section.

12 Q. I wasn't -- okay. My question is do you
13 agree with the conclusion that the examiner drew from
14 the demonstration?

15 A. The only workable procedure comparing
16 direct addition, full sentence, I agree with that,
17 yes.

18 MR. IVEY: Okay. Why don't we stop for
19 lunch at this point? What I guess -- I guess
20 I'd like to propose, we do this for maybe about
21 45 minutes or so and then come back.

22 MS. FERRERA: Which would be fine.

David Heckert

June 4, 2003

Cincinnati, OH

126

1 MS. FERRERA: Just yes or no.

2 THE WITNESS: Excuse me?

3 MS. FERRERA: That's just a yes or no
4 question at this point.

5 A. Yes.

6 Q. Who asked you to perform the tests?

7 A. A patent attorney.

8 Q. What product did you test?

9 A. Minute Maid Plus Calcium.

10 Q. Okay. Do you remember when you tested it?

11 A. I believe it was around '93.

12 Q. Okay. Did you produce any kind of a
13 written report or summary of the findings from your
14 test?

15 MS. FERRERA: Again, that's just a yes or
16 no question.

17 A. Yes.

18 Q. Who did you distribute the results of your
19 tests to?

20 A. To the best of my knowledge, only the
21 attorney.

22 Q. Was that the only time that you ever

David C. Heckert

Volume II
Cincinnati, OH

July 11, 2003

216

1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

2

3

4

5

**CERTIFIED
COPY**

6

The Procter & Gamble Company,

7

Plaintiffs,

8

VS.

CASE NO.

9

The Coca-Cola Company,

C-1-02-393

10

Defendant.

11

12

13

VOLUME II

14

15

DEPOSITION OF: DAVID C. HECKERT

16

17

TAKEN: By the Defendant
Pursuant to Notice

18

DATE: July 11, 2003

19

TIME: Commencing at 9:24 a.m.

20

21

PLACE: Dinsmore & Shohl
19th Floor
255 East Fifth Street
Cincinnati, Ohio 45202

22

David C. Heckert

Volume II
Cincinnati, OH

July 11, 2003

218

1 I N D E X

2

DAVID C. HECKERT

PAGE

3

4 Cross-Examination by Mr. Ivey

219

Examination by Ms. Ferrera

402

5

6 EXHIBITS

MARKED

REFERENCED

7 Defendants' Exhibit 14

236

236

Defendants' Exhibit 15

393

393

8 Defendants' Exhibit 16

346

346

Defendants' Exhibit 17

254

254

9 Defendants' Exhibit 18

257

257

Defendants' Exhibit 19

300

300

10 Defendants' Exhibit 20

398

398

11

12

- - -

13

14

15

16

17

18

19

20

21

22

David C. Heckert

Volume II
Cincinnati, OH

July 11, 2003

293

1 question properly and whether his answer was
2 accurate.

3 So we've located it on the transcript, and
4 I'm going to ask if you could read it -- if the
5 reporter could read it back and have
6 Mr. Heckert respond.

7 (The record was read.)

8 A. Okay. So you've asked me, did I
9 understand that it would not work. So I'm saying,
10 no, I have -- I can't answer that. I had no
11 information at that time to say it would not work.

12 And, in fact, my career was based
13 frequently on taking pieces of prior art where
14 somebody said it would not work and showing that you
15 could do it. So my position at that time would not
16 have been it would not work. It simply would have
17 been, how do we do it.

18 Q. So your position with regard to the direct
19 addition of calcium would have been that it would
20 work?

21 A. That it could.

22 Q. Could work?

David C. Heckert

Volume II
Cincinnati, OH

July 11, 2003

294

1 A. It's possible that it could work. And I'd
2 have to go out and find a way to do it. I would not
3 have taken a position that you can't do it.

4 Q. Okay.

5 A. That's not something I would have done, I
6 don't believe.

7 Q. All right. And so -- I'm sorry.

8 A. I said I don't believe I would have said
9 that without some very strong information that said
10 you couldn't do it.

11 Q. So did you set about to find a way to make
12 the direct addition of calcium work?

13 A. Not at that time.

14 Q. When did you do it?

15 A. That was after we first did the experiment
16 with the premix method, which, as I've said before,
17 happened to be the easiest way to do it in the
18 laboratory.

19 Q. And when you say after you --

20 A. This was in '83. This was this point in
21 '83.

22 Q. All right. So in 1983 is the time frame

David C. Heckert

Volume II
Cincinnati, OH

July 11, 2003

297

1 or the '936 patent the type of qualification you just
2 described for me, which was that a direct addition
3 doesn't work in a batch method, but that it might
4 work in some other type of method?

5 MS. FERRERA: Objection.

6 A. I don't remember what the words were that
7 went with the meeting with the examiner. I -- you
8 know, I don't know if that ever got taped or
9 somebody, you know, kept track of that. I -- I don't
10 remember if we put qualifications on it or not.

11 Q. Did you disclose in the '847 or the '963
12 patent the steps for solubilizing calcium in a juice
13 beverage using a direct addition method?

14 A. No, I don't believe we did. Not that I
15 recall.

16 Q. Why not?

17 A. The '847 patent was a product patent. So
18 the focus was to describe the product and then a
19 process that led to it. It didn't particularly
20 matter what process. The objective was the product.

21 Q. Okay.

22 A. The other patent --

David C. Heckert

Volume II
Cincinnati, OH

July 11, 2003

299

1 Q. And you would agree that the '963 patent
2 lays out a method for solubilizing calcium using a
3 premix method?

4 A. Yes, it does.

5 Q. You would also agree that both the '847
6 and the '963 patent discuss direct addition of
7 calcium into juice products?

8 MS. FERRERA: Objection.

9 Q. Right?

10 MS. FERRERA: Objection.

11 A. As I recall they did, yes.

12 Q. And in connection with the discussion of
13 direct addition, essentially both patents disparage
14 the results when you add calcium directly into juice,
15 right?

16 MS. FERRERA: Objection.

17 A. Yes.

18 Q. Okay. So my question was, in either of
19 those patents, is there a specification of the steps
20 that one skilled in the art could use to solubilize
21 calcium in a juice beverage other than the premix
22 method?

David C. Heckert

Volume II
Cincinnati, OH

July 11, 2003

300

1 A. No. Restate the question.

2 Q. My question was, in either of those
3 patents, the '847 or the '963 patent, is there a
4 specification of the steps that one skilled in the
5 art could use to solubilize calcium in a juice
6 beverage other than the premix method?

7 A. That one could use or choose to use?

8 Q. Did you lay out the steps for any other
9 method of solubilizing calcium in juice, so that
10 somebody could follow what you laid out in the
11 patent, other than a premix method?

12 A. And come up with a juice -- good juice
13 taste -- good tasting juice product?

14 Q. What you called a drinkable juice.

15 A. I don't recall that we had any such thing
16 in the patent.

17 Q. Okay. All right. Let me show you what
18 we'll mark for identification as Exhibit Number 19.

19 (Defendant's Exhibit 19 was marked for
20 identification.)

21 Q. Exhibit Number 19 has "Laboratory Book
22 number VF-2092" on the top there. Do you see that?